Supreme Court, U.S.
FILED
JAN 31 1997
CLERK

No. 96-846

In the Supreme Court of the United States

OCTOBER TERM, 1996

CEMEX, S.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived its objection to the application of the so-called Torrington methodology for calculating antidumping duties by failing to raise that objection in a timely fashion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 95 F.3d 1164 (Table). The opinions of the Court of International Trade are reported at 17 I.T.R.D. (BNA) 2440 (Pet. App. 8a); 17 I.T.R.D. (BNA) 1648 (Pet. App. 9a-18a); and 865 F. Supp. 857 (Pet. App. 19a-38a).

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A petition for rehearing was denied on October 7, 1996. Pet. App. 7a. The petition for a writ of certiorari was filed on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contests the imposition of antidumping duties upon Mexican gray portland cement by the International Trade Administration of the United States Department of Commerce (Commerce). Commerce imposed those duties pursuant to Section 731 of the Trade Agreements Act of 1979 (1979 Trade Act), 19 U.S.C. 1673, which requires the imposition of duties on foreign-made goods sold at less than fair market value when such sales materially injure or threaten to materially injure domestic industries. The original antidumping order on Mexican gray portland cement was published on August 29, 1990. *Gray Portland Cement and Clinker From Mexico*, 55 Fed. Reg. 35,371 (1990). Pursuant to Section 751(a) of the 1979 Trade Act, 19 U.S.C. 1675(a), Commerce conducted a periodic review of the applicable duties and on April 28, 1993, published its final determination of that review. *Gray Portland Cement and Clinker From Mexico*, 58 Fed. Reg. 25,803 (1993).

2. In an action filed in the Court of International Trade (CIT) pursuant to Section 516A of the 1979 Trade Act, 19 U.S.C. 1516a, the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement (Ad Hoc Committee), a respondent herein, contested that final determination. Petitioner CEMEX intervened as a defendant.

One of the issues raised in that proceeding concerned the methodology employed by Commerce in calculating an adjustment to the antidumping duties. Commerce had applied what has come to be known as the Federal-Mogul methodology in adjusting for Mexico's value-added tax (VAT). See *Federal-Mogul Corp.* v. *United States*, 834 F. Supp. 1391, 1396 (Ct.

Int'l Trade 1993) (*Federal-Mogul I*), rev'd, 63 F.3d 1572 (Fed. Cir. 1995) (*Federal-Mogul II*). That methodology adjusts the antidumping duties based upon the absolute amount of the VAT. In *Federal-Mogul I*, however, the CIT held that the Federal-Mogul methodology was not in accordance with law. As a result of that decision, the Ad Hoc Committee contested Commerce's use of that methodology in its review of the duties on Mexican cement. Commerce proposed that the CIT remand the matter so that it could apply a new methodology, the so-called Torrington methodology, that had been used in *Torrington Co.* v. *United States*, 853 F. Supp. 446, 448-449 (Ct. Int'l Trade 1994). The Torrington methodology adjusts the antidumping duties based upon the foreign-market tax rate.

In an opinion filed September 26, 1994, the CIT remanded the matter to Commerce, directing it to "apply its new VAT methodology as approved in *Torrington*." Pet. App. 29a. The court specifically noted that petitioner agreed that Commerce should apply that methodology: "Commerce thus agrees that the Court should remand this case for VAT adjustment, *as does CEMEX*." *Id.* at 29a (emphasis added).[1]

3. On remand, Commerce recalculated the antidumping duties according to the Torrington methodology. Pet. App. 68a-88a. During the administrative remand proceedings, petitioner expressed its general

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[1] In its petition, CEMEX concedes that it "did not initially object to the CIT's order that the *Torrington* methodology be used, but subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodology." Pet. 4.

approval of the use of that methodology. See *id.* at 16a.

4. Petitioner appealed the results of the first remand to the CIT. Among other contentions, petitioner urged the court to hold that Commerce should not have applied the Torrington methodology. Pet. App. 16a. The CIT declined to consider that objection on the ground that "CEMEX did not address this issue in a timely manner." *Ibid.* In so holding, the CIT noted that petitioner had not raised any objection to the application of the Torrington methodology when the court entertained oral argument on the motion to remand: "At oral argument prior to remand, the court indicated it would direct Commerce to apply its new VAT methodology as used in the * * * cases * * * decided by the judge in Torrington. * * * All parties apparently understood that the VAT methodology was the one described in Torrington." *Id.* at 16a & n.7. The CIT further noted that, in proceedings pursuant to the remand order, petitioner affirmatively urged Commerce to apply the Torrington methodology. *Id.* at 16a. The CIT reasoned that "[a]s to the specific application of Torrington to these facts, CEMEX had an obligation, before it supported Torrington or acquiesced in it, to examine application of the new VAT methodology to its product if it wanted to claim an exception from the methodology for this case." *Id.* at 16a-17a.

While rejecting as untimely petitioner's objection to the use of the Torrington methodology, the CIT remanded the proceedings to Commerce a second time for corrections unrelated to the issue of application of the Torrington methodology.

5. After Commerce issued the results of the second remand, Pet. App. 89a, petitioner again appealed to

the CIT, objecting both to the results and to the use of the Torrington methodology. In an opinion issued July 12, 1995, the CIT sustained the second remand results. *Id.* at 8a. The CIT also rejected petitioner's challenge to the Torrington methodology:

> Contrary to Cemex's objections all parties were aware that on remand the court was ordering [Commerce] to apply its new methodology, which was approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-9 (1994). As previously indicated, Cemex also affirmatively led [Commerce] to believe it supported that approach. Cemex's new challenge to [Commerce]'s VAT methodology is untimely.

Ibid.

6. Petitioner appealed the CIT's judgment sustaining the second remand results to the Court of Appeals for the Federal Circuit. Petitioner argued that prior to the first remand it had not been on notice that the Torrington methodology would be used and therefore should not have been expected to object to it. Pet. App. 4a. Petitioner further argued that the court should reject as contrary to law the use of the Torrington methodology.[2]

The court of appeals affirmed the CIT's holding that petitioner waived any challenge to the application of the Torrington methodology. Pet. App. 4a. The court concluded that the CIT "correctly found that CEMEX did not properly articulate its objection

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[2] While petitioner's appeal was pending, and before petitioner filed its opening brief, the court of appeals issued its opinion in *Federal-Mogul II*, in which it reversed the CIT's decision in *Federal-Mogul I*, holding that the Federal-Mogul methodology was not contrary to law. 63 F.3d at 1580.

when it should have" and "never objected to the court's direction to apply that methodology on remand." *Ibid.* The court noted that the CIT found that petitioner had affirmatively accepted application of the Torrington methodology. *Ibid.* As a result, the court held that petitioner had failed to show that the CIT abused its discretion in finding that petitioner's objections to the Torrington methodology were untimely. Because it concluded that petitioner did not timely object to application of the Torrington methodology, the court of appeals did not review the merits of Commerce's use of that VAT methodology. *Ibid.*

ARGUMENT

The court of appeals correctly upheld the trial court's holding that petitioner waived any objection to the application of the Torrington methodology. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is not warranted.

1. Petitioner argues (Pet. 6-8) that under Section 516A(a) of the 1979 Trade Act, 19 U.S.C. 1516a(a), the only proper subject of judicial review is the final determination by Commerce in a periodic review of antidumping orders. According to petitioner, "Commerce's inclusion of the *Torrington* methodology in its June 1995 court-ordered remand results is not the correct subject of judicial review." Pet. 7. That argument is quite curious given that petitioner seeks reversal of the decision upholding the application of the Torrington methodology. In any event, petitioner misconstrues Section 516A(a). While that Section does provide a cause of action in the CIT to challenge a Department of Commerce final determination, it also authorizes the CIT to remand that determina-

tion to the Department of Commerce. 19 U.S.C. 1516a(c)(3). Furthermore, 28 U.S.C. 1295(a)(5) confers jurisdiction on the Court of Appeals for the Federal Circuit to review final judgments of the CIT. Accordingly, the CIT's decision to order Commerce to use the Torrington methodology and petitioner's failure to object to that order were properly presented to the court of appeals and are properly before this Court.

2. Petitioner waived its objection to the use of the Torrington methodology by failing to object to it prior to the first remand. In its petition for certiorari, petitioner has abandoned the argument it presented to the court of appeals, that its failure to object to the application of the Torrington methodology should be excused for lack of notice. Prior to the first remand, the CIT explicitly stated that the Department of Commerce should apply the Torrington methodology, and petitioner subsequently voiced its approval of that methodology. Pet. App. 16a. Accordingly, the courts below correctly ruled that petitioner was on notice that the Torrington methodology would be applied, and that its failure to object to that methodology prior to the first remand therefore constituted a waiver of the objection.

Petitioner now asserts for the first time that it was not required to object to the application of the Torrington methodology because that methodology was mandated by then-controlling precedent, which was subsequently reversed in a decision that should have bound the court of appeals in this case. Because petitioner did not raise that argument in the courts below, it is not properly before this Court. *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996); *Department of Revenue of Montana* v.

Kurth Ranch, 511 U.S. 767, 772 n.9 (1994); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Furthermore, whether the court of appeals properly followed its own precedent is not the type of question ordinarily reviewed by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties," including "doubt about the respect to be accorded to a previous decision of a different panel.").

In any event, the central premises of petitioner's argument are incorrect. First, petitioner errs in asserting (Pet. 6) that at the time of the first remand, the CIT's previous decision in *Federal Mogul I* constituted a controlling decision. The decision of one judge of the CIT in a different case is not controlling in other proceedings conducted by the same or other judges. *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989). If petitioner had any objection to the application of the Torrington methodology, or believed that the *Federal-Mogul I* court was wrong to reject the Federal-Mogul methodology, petitioner could have presented its argument to the trial court and the trial court could have considered and addressed the two methodologies.

Second, petitioner incorrectly asserts (Pet. 8-14) that the court of appeals' decision in *Federal-Mogul II* mandates the use of the Federal-Mogul methodology. In *Federal-Mogul II*, the court of appeals held that the Federal-Mogul methodology was "not precluded" by the statutory language and was not "an unreasonable way" to implement statutory policy. 63 F.3d at 1580. The court did not hold that the Federal-

Mogul methodology was mandated by law or that the Torrington methodology was contrary to law. *Federal-Mogul II* thus did not alter the validity of the Torrington methodology, and application of that methodology does not conflict with *Federal-Mogul II*. Accordingly, the principle urged by petitioner (Pet. 9-12), that a change in the law should apply to all pending cases, has no relevance here. Nor does the decision in *Federal-Mogul II* excuse petitioner's failure to make a timely objection to the application of the Torrington methodology.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997